IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No S172 of 2012

BETWEEN:

**MAN HARON MONIS**
Appellant

and

**THE QUEEN**
First Respondent

**ATTORNEY-GENERAL FOR THE STATE OF NEW SOUTH WALES**
Second Respondent

No S179 of 2012

BETWEEN:

**AMIRAH DROUDIS**
Appellant

and

**THE QUEEN**
First Respondent

**ATTORNEY-GENERAL FOR THE STATE OF NEW SOUTH WALES**
Second Respondent

# ANNOTATED SUBMISSIONS OF THE ATTORNEY-GENERAL FOR THE STATE OF VICTORIA (INTERVENING)

## PART I: CERTIFICATION

1. These submissions are suitable for publication on the Internet.



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## PART II: BASIS OF INTERVENTION

2. The Attorney-General for Victoria intervenes in this proceeding pursuant to s 78A of the *Judiciary Act 1903* (Cth) in support of the respondents.

## PART III: WHY LEAVE TO INTERVENE SHOULD BE GRANTED

3. Not applicable.

## PART IV: CONSTITUTIONAL AND LEGISLATIVE PROVISIONS

4. It is not necessary to add to the statement of applicable statutory provisions set out in the annexures to the submissions of the appellants and the Attorney-General of the Commonwealth.

## PART V: ARGUMENT

**Summary of argument**

5. In summary:

(a) The offence created by s 471.12 of the *Criminal Code* (**the Code**) is concerned with conduct – the *use* of a postal or similar service in a particular manner – and not solely with the contents of a particular communication.

(b) The word "offensive" should be understood in the sense adopted by the New South Wales Court of Criminal Appeal. The circumstances relevant to whether a reasonable person would regard a use of a postal service as offensive in that sense include the fact that robust expression is a legitimate aspect of political communication in Australia.

(c) To contravene s 471.12, a person must either intend or be reckless as to the prospect that a reasonable person would regard the use of the postal service as offensive in the relevant sense.

(d) Section 471.12 does not impede the use of the postal service to engage in communication on political and governmental matters in a manner that is not offensive in the relevant sense and does not restrict the availability of means of communication other than postal or similar services.

(e) As such, if s 471.12 imposes any burden at all on the ability of voters to exercise a free and informed choice under the Constitution, that burden is very slight.

(f) The legitimate end sought to be achieved by the prohibition on the use of a postal or similar service in a manner that is "offensive" in the sense in which that word was construed by the Court of Criminal Appeal is to protect individuals from being confronted by unsolicited and offensive material in the mail.

(g) In light of the above matters, s 471.12 is reasonably appropriate and adapted to serve that legitimate end.

**Construction of s 471.12 of the *Criminal Code***

6. The first step in considering the validity of s 471.12 of the Code is one of statutory construction.[1] That process must begin with a consideration of the words of the section, read as a whole and in light of their context and purpose.[2]

7. It is not sufficient to focus, as the appellant Monis does,[3] solely upon the word "offensive". When read as a whole, two important features of s 471.12 emerge. The first is that the offence created is concerned with conduct: the *use* of a postal or similar service in a particular manner. It is not concerned merely with the content of communications. The word "use" is not defined in the Code, but would include the common use of a postal service by sending a letter or parcel to another person. Sending a letter or parcel with exactly the same content to two different people may constitute separate and different uses of a postal service.[4]

8. Secondly, whether a particular "use" of a postal service contravenes the section is to be determined objectively by reference to what "reasonable persons would regard as

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1 *Coleman v Power* (2004) 220 CLR 1 at 21 [3] (Gleeson CJ), 68 [158] (Gummow and Hayne JJ); *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* (2008) 234 CLR 532 at 553 [11] (Gummow, Hayne, Heydon and Kiefel JJ).

2 *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (NT)* (2009) 239 CLR 27 at 46-47 [47] (Hayne, Heydon, Crennan and Kiefel JJ); *Momcilovic v The Queen* (2011) 85 ALJR 957; 280 ALR 221 at [56] (French CJ).

3 Monis submissions at pars 11-16.

4 In that regard it may be noted that the appellants were not charged with offences as a result of the same letters as those the subject of these proceedings being sent to various political and public figures.

being, in all the circumstances, menacing, harassing or offensive". The identity of the recipient or recipients is a relevant circumstance: a communication with exactly the same content may constitute an offence when sent to one recipient, but not to another. As the Court of Criminal Appeal recognised, the existence and importance of the freedom of political communication and the fact that such communication can legitimately be conducted in robust terms are also relevant circumstances.[5] This is significant for both limbs of the *Lange* test.

9. The meaning and significance of the word "offensive" in s 471.12(b) falls to be considered in this context. The construction adopted by the Court of Criminal Appeal should be accepted. Bathurst CJ, with whom Allsop P agreed, considered a number of relevant textual and contextual factors, many of which find reflection in the reasoning of this Court in *Coleman v Power*,[6] including the fact that the section creates a criminal offence with a relatively severe maximum penalty;[7] the collocation of the words "menacing", "harassing" and "offensive";[8] and the statutory context of s 471.12.[9] His Honour concluded that to be "offensive" within the meaning of s 471.12, the use must be "calculated or likely to arouse significant anger, significant resentment, outrage, disgust, or hatred in the mind of a reasonable person in all the circumstances. However, it is not sufficient if the use would only hurt or wound the feelings of the recipient, in the mind of a reasonable person."[10]

10. The scope of s 471.12 is further confined when regard is had to the "fault element" applicable to the provision. Paragraph (b) of s 471.12 constitutes a physical element of the offence that consists of a circumstance in which the conduct specified in paragraph (a) occurs.[11] By virtue of the operation of s 5.6(2) of the Code, the "fault

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5 (2011) 256 FLR 28 at [65] (Bathurst CJ) [**JAB 100-101**], [88] (Allsop P) [**JAB 110**], [99] (McClellan CJ at CL) [**JAB 113**].

6 (2004) 220 CLR 1.

7 (2011) 256 FLR 28 at [39]-[40] (Bathurst CJ) [**JAB 92**], [72] (Allsop P) [**JAB 102**], [106] (McLellan CJ at CL) [**JAB 115**]; cf *Coleman v Power* (2004) 220 CLR 1 at 25 [12] (Gleeson CJ), 74 [183], 75 [185] (Gummow and Hayne JJ), 87 [224] (Kirby J).

8 (2011) 256 FLR 28 at [42], [45] (Bathurst CJ) [**JAB 93**], [73] (Allsop P) [**JAB 103**]; cf *Coleman v Power* (2004) 220 CLR 1 at 77 [192] (Gummow and Hayne JJ), 87 [224] (Kirby J).

9 (2011) 256 FLR 28 at [37]-[38] (Bathurst CJ) [**JAB 92**], [74] (Allsop P) [**JAB 103**].

10 (2011) 256 FLR 28 at [44] (Bathurst CJ) [**JAB 93**]. In context, the last sentence excludes from the provision "mere" hurt or wounded feelings, rather than offence caused only to the particular recipient.

11 See s 4.1(1)(c) of the Code.

element" in respect of the circumstance that reasonable persons would regard the use of the postal service as being, in all the circumstances, offensive, is recklessness.[12] "Recklessness" is defined in s 5.4 of the Code. By that definition, it must be proved under s 417.12: (a) that the person was at least aware of a substantial risk that reasonable persons would regard his or her use of the postal service as offensive in all the circumstances; and (b) that, having regard to the circumstances known to the person, it was unjustifiable to take that risk.[13]

11. In addition, as Gummow and Hayne JJ and Kirby J noted in *Coleman v Power*, an offence such as that created by s 471.12 which potentially restricts the freedom of speech recognised at common law should be narrowly construed, so far as constructional choices are open, in order to limit the restriction imposed upon the freedom.[14]

12. Bathurst CJ held that only those uses of a postal system that cause "significant" anger or resentment would be "offensive" for the purposes of the section. The appellants contend that the legislative history of s 471.12 stands against the use of the qualification "significant".[15] However, Bathurst CJ did not construe "offensive" as meaning "significantly offensive". Moreover, where constitutional considerations are relevant, the construction of a word or phrase capable of different shades of meaning,[16] such as "offensive", must ordinarily be constrained by the principle that a construction should be adopted which avoids, rather than leads to, constitutional

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12 See *Crowther v Sala* [2008] 1 Qd R 127, concerning the equivalent provision regarding use of a carriage service, s 474.17 of the Code: at 135-137 [43]-[48] (McMurdo J, with whom Muir J agreed); cf at 132-133 [24]-[26] (Williams JA). Section 5.6(2) provides that, if the law creating an offence does not specify a fault element for a physical element that consists of a circumstance, recklessness is the fault element for that physical element.

13 The fault element of recklessness will also be satisfied by "knowledge", namely awareness that reasonable persons do or will regard the use in question as offensive in all the circumstances: s 5.4(4), read with s 5.3 of the Code. Similarly, "intention" will also satisfy the fault element of recklessness: s 5.4(4) read with s 5.2 of the Code.

14 See *Coleman v Power* (2004) 220 CLR 1 at 75-76 [185]-[188] (Gummow and Hayne JJ), 87 [225], 96-98 [250]-[253] (Kirby J); *Hogan v Hinch* (2011) 243 CLR 506 at 542 [47] (French CJ); *Momcilovic v The Queen* (2011) 85 ALJR 957; 280 ALR 221 at [42]-[45] (French CJ). Allsop P referred to the principle of legality: (2011) 256 FLR 28 at [72] (Allsop P) [**JAB 102**]. See also *Sunol v Collier (No 2)* (2012) 289 ALR 128; (2012) 260 FLR 414 at [59] (Allsop P).

15 Monis submissions at par 16; Droudis submissions at pars 41-59, 64.

16 What Allsop P called "a broad relative concept": (2011) 256 FLR 28 at [77] [**JAB 102-103**]. See also *Sunol v Collier (No 2)* (2012) 289 ALR 128; (2012) 260 FLR 414 at [63] (Allsop P): "a wide relative descriptor".

invalidity.[17] It would only be in rare cases that considerations of legislative history are so compelling that they remove any element of ambiguity or constructional choice and require a general word or phrase to be construed in a manner that would lead to invalidity. This is not such a case.

13. The legislative history outlined by the appellant Droudis[18] does indicate, however, that the focus of the various offences has shifted since 1901 from the *content* of articles sent through the post[19] to the *use* of the postal service. This history reinforces what is in any event apparent from the text of s 471.12, namely that it is not solely concerned with the content of postal communications.

10 **The first *Lange* question**

14. The terms of the two questions that arise when determining whether a law infringes the implied freedom of political communication (the *Lange*[20] questions) are well settled.[21]

15. The first question asks whether in its terms, operation or effect, the law effectively burdens freedom of communication about government or political matters.[22] To constitute an "effective" burden, the law must impose a real, meaningful and not insubstantial limit or restriction on the freedom of political and governmental communication protected by the Constitution.[23] The relevant inquiry concerns the effect, if any, that the law has on the freedom of communication generally, not upon
20 how a particular individual might want to construct a particular communication.[24]

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17 *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* (2008) 234 CLR 532 at 553 [11] (Gummow, Hayne, Heydon and Kiefel JJ); *Acts Interpretation Act* 1901 (Cth), s 15A.

18 Droudis submissions at pars 41-59.

19 See s 107 of the *Post and Telegraph Act 1901* (Cth), referred to at par 47 of the Droudis submissions.

20 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 (***Lange***) at 567-568 (the Court).

21 *Wotton v Queensland* (2012) 86 ALJR 246; 285 ALR 1 (***Wotton***) at [25] (French CJ, Gummow, Hayne, Crennan and Bell JJ), [75], [77] (Kiefel J); cf Heydon J at [41].

22 *Wotton* at [25] (French CJ, Gummow, Hayne, Crennan and Bell JJ); *Hogan v Hinch* (2011) 243 CLR 506 at 542 [47] (French CJ), 555-556 [94]-[97] (Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ).

23 *Wotton* at [54] (Heydon J).

24 *APLA v Legal Services Commissioner (NSW)* (2005) 224 CLR 322 at 451 [381], endorsed by French CJ in *Hogan v Hinch* (2011) 243 CLR 506 at 544 [50]; *Wotton* at [80] (Kiefel J).

16. The particular communication said to contravene the law in question may serve to illustrate whether and how the law might restrict communication of a political nature. [25] However, the freedom extends only so far as to protect that "communication between the people concerning political or governmental matters which enables the people to exercise a free and informed choice as electors".[26] It is therefore necessary to consider whether the law in question imposes a real and meaningful restriction on the ability of electors "to gain an appreciation of the available alternatives" [27] so as to enable them to exercise a true choice. To focus only upon whether there is a burden upon a particular form or manner of communication is to risk characterisation of the law in question not by its effect on the freedom of political communication, the constitutional issue, but by its effect upon a particular communication by a particular person.[28] That would impermissibly treat the implied freedom as an individual free speech right instead of a limitation on power directed to protecting the electoral element of the constitutional system of government. The fact that a law may incidentally restrict a particular form of communication on political or governmental matters does not necessarily mean that the law burdens the ability of voters to exercise a true, free and informed choice.

17. Section 471.12 imposes criminal liability on the use of a postal or similar service in a manner that reasonable persons would regard in all the circumstances as "offensive" in the sense explained by the Court of Criminal Appeal. Resolution of the question whether, so construed, s 471.12 imposes an effective burden on the freedom of political communication must take into account the following matters:

(a) First, as Allsop P recognised,[29] the use of postal or similar services is an essential and well-established means of communication on government and political matters.

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25 *Wotton* at [80] (Kiefel J).

26 *Lange* at 560 (the Court).

27 *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 at 187 (Dawson J), quoted in *Lange* at 560 (the Court).

28 A similar risk is recognised in the application of s 92 of the Constitution: *Betfair Pty Limited v Racing New South Wales* (2012) 86 ALJR 418, 286 ALR 221 at [46] (French CJ, Gummow, Hayne, Crennan and Bell JJ).

29 (2011) 256 FLR 28 at [84] [**JAB 108**].

(b) Secondly, the use of means of expression that are robust, insulting and that some people may find confronting can be a legitimate part of the exercise of the freedom of political and governmental communication protected by the Constitution.[30]

(c) Thirdly, the circumstances relevant to whether a reasonable person would regard a use of a postal service as offensive in the relevant sense include the fact that reasonable persons would understand that the use of such robust means of expression can be a legitimate part of political communication in this country.[31] As a result, the offence will only prohibit those uses of the postal service that the tribunal of fact considers, even after having regard to its political context, has crossed those boundaries and is therefore "likely to arouse significant anger, significant resentment, outrage, disgust, or hatred in the mind of a reasonable person in all the circumstances".[32]

(d) Fourthly, as set out above, the person using the postal service must at least be reckless as to whether reasonable persons would regard that use as being offensive in all the circumstances.

18. In addition, the section leaves ample alternative avenues for political communication and agitation. It does not touch upon political communication through postal or similar services that is conducted in terms that are not offensive in the relevant sense, which must account for the vast majority of political communication through the post. It does not touch upon communications by any other means. In its potential application to any person who wishes to disseminate a political message, the section "does not prevent the substance of what he wants to communicate from being communicated",[33] either through the post or by other means.

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30 *Coleman v Power* (2004) 220 CLR 1 at 45-46 [81], 54 [105] (McHugh J), 78 [197] (Gummow and Hayne JJ), 91 [239] (Kirby J).

31 Similarly, in *R (ProLife Alliance) v British Broadcasting Corporation* [2004] 1 AC 185 at 225 [12], Lord Nicholls of Birkenhead observed that "the context in which material is transmitted can [clearly] play a major part in deciding whether transmission will breach the offensive material restriction" (citing the acceptable broadcast, within strict limits, of "harrowing", "gruesome", "distressing" and "unpleasant" material to illustrate political points).

32 (2011) 256 FLR 28 at [44] (Bathurst CJ) [**JAB 93**].

33 *Wotton* at [59] (Heydon J).

19. Having regard to these matters, if the prohibition in s 471.12 constitutes any burden on the ability of voters to exercise an informed choice under the Constitution, it is a very slight one.

**The second *Lange* question**

The legitimate ends served by s 471.12

20. If the first question is answered in the affirmative, the second *Lange* question asks whether the law is nevertheless reasonably appropriate and adapted to serve a legitimate end in a manner compatible with the maintenance of the constitutionally prescribed system of representative and responsible government.[34] As French CJ, Gummow, Hayne, Crennan and Bell JJ said in *Wotton*,[35] that system of government has the features identified in *Aid/Watch Incorporated v Federal Commissioner of Taxation*,[36] namely, "a universal adult franchise,[37] and a system for amendment of the Constitution in which the proposed law to effect the amendment is to be submitted to the electors. Communication between electors and legislators and the officers of the executive, and between electors themselves, on matters of government and politics is 'an indispensable incident' of that constitutional system[38]". The system thus "postulates, for its operation, communication in the nature of agitation for legislative and political changes".[39]

21. The fact that, as discussed above, s 471.12 is concerned with conduct – the *use* of a postal or similar service in a particular manner, including by sending a particular communication to another person – and not merely with the content of communications is relevant to the identification of the end to which the section is directed. It indicates that the end is not, as the appellant Droudis suggests,[40] just to

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34 *Wotton* at [25] (French CJ, Gummow, Hayne, Crennan and Bell JJ).

35 *Wotton* at [25] (French CJ, Gummow, Hayne, Crennan and Bell JJ).

36 (2010) 241 CLR 539.

37 *Roach v Electoral Commissioner* (2007) 233 CLR 162 at 174-175 [7]-[8] (Gleeson CJ), 186-188 [44]-[49] (Gummow, Kirby and Crennan JJ).

38 *Lange* at 559-560.

39 *Wotton* at [20] (French CJ, Gummow, Hayne, Crennan and Bell JJ), referring to *Aid/Watch Incorporated v Federal Commissioner of Taxation* (2010) 241 CLR 539 at 556 [45] (French CJ, Gummow, Hayne, Crennan and Bell JJ).

40 Droudis submissions at pars 70-71, 86. The appellant Monis does not appear to dispute that the ends identified by the Court of Criminal Appeal, at least those identified by Allsop P, are legitimate.

prevent "laceration of feelings" or to ensure civility of discourse. The end to which s 471.12 is directed, as Allsop P held,[41] is to protect individuals from the sense of intrusion or invasion brought about by receiving unsolicited and offensive material in the mail.

22. As Bathurst CJ recognised, material sent in the mail is generally sent to a person's home or work and is therefore personalised, usually opened by the person to whom it is addressed and often unable to be avoided: "[a] recipient of material sent by post essentially is a captive audience".[42] Mail may be targeted to particular recipients, or recipients may at least apprehend that they have been targeted. It may be anonymous and so unable to be answered. The offensive material might not be enclosed within an envelope or wrapping; even if it is, the recipient may examine the contents before appreciating their offensive character. It can readily be understood how the receipt of material in the post that is "likely to arouse significant anger, significant resentment, outrage, disgust or hatred in the mind of a reasonable person" even after having regard to its political context can undermine public confidence in the postal service.[43] These are matters of legitimate concern for the legislature.

23. Even in the context of the First Amendment, the Supreme Court of the United States has recognised the legitimate governmental interest in legislating to protect people from such unwanted offensive intrusions. Allsop P referred[44] in this context to *Rowan v United States Post Office*,[45] where the Supreme Court upheld a law permitting recipients of advertising material they considered to be "sexually provocative" to remove themselves from the sender's mailing list.

24. Similarly, in *Federal Communications Commission v Pacifica Foundation,*[46] the Supreme Court upheld a declaratory order that the respondent had contravened a

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Rather, his submissions appear to be directed to whether s 471.12 is reasonably appropriate and adapted to achieve those ends: Monis submissions at pars 33-40.

41 (2011) 256 FLR 28 at [87]-[88] **[JAB 110]**.

42 (2011) 256 FLR 28 at [59] **[JAB 98-99]**.

43 (2011) 256 FLR 28 at [78] **[JAB 105]**.

44 (2011) 256 FLR 28 at [87] **[JAB 110]**.

45 397 US 728 (1970).

46 438 US 726 at 747 (1978).

statutory prohibition on the use of indecent language in radio broadcasting. Stevens J, delivering the opinion of the Court, said that:

> the broadcast media have established a uniquely pervasive presence in the lives of all Americans. Patently offensive, indecent material presented over the airwaves confronts the citizen, not only in public, but also in the privacy of the home, where the individual's right to be left alone plainly outweighs the First Amendment rights of an intruder.[47]

25. *Snyder v Phelps*,[48] on which both appellants rely,[49] does not assist them. In *Snyder*, the Supreme Court decided that the First Amendment protected a group of persons picketing on public land near a soldier's funeral from liability for intentional infliction of emotional distress and other torts at the suit of relatives of the deceased. The Court emphasised the importance of the public forum on which the picketing took place and specifically noted that the protest group's "choice of where and when to conduct its picketing [was] not beyond the Government's regulatory reach".[50] However, a State law prohibiting funeral picketing was not in effect at the time of the events in question and the Court therefore had no occasion to consider whether that law was a reasonable time, place or manner restriction upon the freedom of speech.[51]

Reasonably appropriate and adapted

26. Section 471.12 regulates all communications through the postal and similar services. It is not directed to communications that are inherently political. Any burden imposed upon political communication is incidental to the achievement of the legitimate end to which the section is directed. As such, the conclusion will more readily be reached that the section is reasonably appropriate and adapted to serve

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47 438 US 726 at 748 (1978) (Stevens J, with whom Burger CJ, Rehnquist, Powell and Blackmun JJ joined); see also at 759-760 (Powell J, with whom Blackmun J joined, concurring). This statement was endorsed by Lord Hoffmann in *R (ProLife Alliance) v British Broadcasting Corporation* [2004] 1 AC 185 at 228 [22].

48 No 09-75, 2 March 2011, to be reported in 562 US (2011).

49 Monis submissions at par 55; Droudis submissions at pars 81-82.

50 Slip Opinion of Roberts CJ (in which Scalia, Kennedy, Thomas, Ginsburg, Breyer, Sotomayor and Kagan JJ joined) at p 10. Contrast *Frisby v Shultz* 487 US 474 (1988), which concerned conduct directed at a private residence. O'Connor J, delivering the opinion of the Court, said that the First Amendment "permits the government to prohibit offensive speech as intrusive when the 'captive' audience cannot avoid the objectionable speech": at 487 (citations omitted).

51 Slip Opinion of Roberts CJ (in which Scalia, Kennedy, Thomas, Ginsburg, Breyer, Sotomayor and Kagan JJ joined) at pp 10-11.

identified legitimate ends in a manner that is compatible with the maintenance of the constitutionally prescribed system of government.[52]

27. As submitted above, in so far as s 471.12 burdens the freedom of political communication at all, any such burden is very slight. The section does not impose, in the words of McHugh J in *Coleman v Power*,[53] "an unqualified prohibition" on the use of offensive communications in political discussion. It criminalises such communications only where they take place through a postal or similar service and where, considered objectively and in all the circumstances (including their political context where relevant), the degree of offence caused is such that they are likely to arouse significant anger, significant resentment, outrage, disgust or hatred in the mind of a reasonable person. Moreover, as already noted, the "fault element" associated with the provision operates to exclude from its scope those offensive uses of a postal service which are not intentionally or recklessly so.

28. The reasonableness standard operates as a substantial qualification on the reach of the section and therefore on the extent of any burden on the freedom of political communication. As discussed above, the reasonableness standard would require the tribunal of fact to give due weight, in an appropriate case, to the importance of political communication and the fact that the use of robust or insulting means of expression can be a legitimate part of political communication in Australia.[54]

29. The operation of s 471.12 will therefore be sensitive to the context in which the particular "use" of the postal service occurs, including not only the content of the communication but also the identity of the recipient or recipients, whether the communication was made pursuant to a subscription between the sender and the recipient,[55] whether the communication was targeted to particular individuals or was, for example, part of a general mailout to all residents in a particular electorate, and

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52 *Coleman v Power* (2004) 220 CLR 1 at 30 [27], 31 [31] (Gleeson CJ); *Hogan v Hinch* (2011) 243 CLR 506 at 555-556 [95]-[99] (Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ); *Wotton* at [30] (French CJ, Gummow, Hayne, Crennan and Bell JJ).

53 (2004) 220 CLR 1 at 54 [105].

54 An analogy may be drawn to *Hogan v Hinch* (2011) 243 CLR 506 where the power of the court to make a suppression order if satisfied it was in the public interest to do so was to be exercised in light of the constitutional and legal context, including the open court principle and the common law freedom of communication: (2011) 243 CLR 506 at 537 [32], 544 [50] (French CJ).

55 Cf Monis submissions at par 46.

whether it occurred during an election period or the period leading up to a referendum. The reasonableness standard will therefore insulate uses of the postal service which may otherwise be considered offensive in the relevant sense but, having regard to their political content and context, cannot be considered to be so. Section 471.12 will only prohibit those uses of a postal service that the tribunal of fact considers, having regard to such considerations, are "likely to arouse significant anger, significant resentment, outrage, disgust, or hatred in the mind of a reasonable person in all the circumstances".[56] It is very unlikely, for example, that the 'how to vote' cards considered in *Patrick v Cobain*,[57] referred to by the appellant Monis,[58] would fall foul of the section.

30. The jury would have to be directed accordingly, but this does not leave compliance with the implied freedom in any particular case in the hands of the jury. The trial judge would be able to withdraw from the consideration of the jury an alleged offence against s 471.12 of the Code if, having regard to the circumstances and the existence of the constitutional freedom, a particular use of a postal service is incapable as a matter of law of being regarded by reasonable persons as offensive in the relevant sense. Subject to that limit, however, the question of whether reasonable persons would regard a particular use of the postal service in question as being in all the circumstances "offensive", notwithstanding its political content, involves no constitutional question and is a matter eminently suited to the determination of a jury.

31. Neither appellant has identified any less restrictive means by which the legitimate ends pursued by s 471.12 could be achieved as effectively as the section in its current form.[59] The fact that the section does not contain any qualification in the nature of a "fighting words" construction is irrelevant.[60] In this respect, both appellants rely

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56 (2011) 256 FLR 28 at [44] (Bathurst CJ) [**JAB 93**].

57 [1993] 1 VR 290.

58 Monis submissions at par 44.

59 *Uebergang v Australian Wheat Board* (1980) 145 CLR 266 at 306 (Stephen and Mason JJ); *Rowe v Electoral Commissioner* (2010) 243 CLR 1 at 134 [438] (Kiefel J); and *Momcilovic v The Queen* (2011) 85 ALJR 957; 280 ALR 221 at [556] (Crennan and Kiefel JJ).

60 Cf Monis submissions at par 50.

heavily upon *Coleman v Power*.[61] In that case, Gummow and Hayne JJ and Kirby J construed the term "insulting words" in a criminal offence to mean words which in the circumstances in which they were used were intended or reasonably likely to provoke unlawful physical retaliation. *Coleman v Power* does not offer an analogy in this case. The law in question in *Coleman v Power* prohibited the use of insulting words to a person in a public place. The fact that the Court of Criminal Appeal's construction of the word "offensive" in s 471.12 is not limited in the same way does not suggest any discordance with *Coleman v Power*.[62] The constitutional limits of the legislature's ability to criminalise conduct occurring in a public place on the ground that it is "insulting" or even "offensive" are not coterminous with the limits of its ability to criminalise conduct on those grounds that takes place through the postal system. The context necessarily affects the extent to which Parliament can validly proscribe conduct of an "offensive" nature.[63]

32. For the same reason, the fact that s 471.12 does not contain an exception or defence for offensive communications relevant to government and political matters does not suggest that it is not reasonably appropriate and adapted to serve the identified end.[64] The freedom of political communication is not absolute[65] and "offensive" expression is not entitled to a constitutional immunity just because it has a political element.

33. The analogy drawn by the appellants to the range of defences to a defamation claim is also inapt:[66]

(a) The two laws serve different purposes and attach to different conduct. The purpose of the law of defamation is to protect individuals from injury to their reputation. An essential element of the tort is the publication of defamatory matter to a third party. The defences of truth, fair comment and qualified

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61 (2004) 220 CLR 1.

62 Cf Monis submissions at pars 49-50.

63 Cf *Federal Communications Commission v Pacifica Foundation* 438 US 726 at 747 (1978) (Stevens J, with whom Burger CJ and Rehnquist J joined in this part of the opinion): "the constitutional protection accorded to a communication containing such patently offensive sexual and excretory language need not be the same in every context".

64 Cf Droudis submissions at par 96.

65 *Lange* at 561.

66 Monis submissions at pars 47, 53; Droudis submissions at pars 74-77.

privilege identify circumstances where the publication of defamatory matter to a third party is nevertheless justified in order to strike a fair balance between the protection of reputation and freedom of speech.[67] The prohibition in s 471.12 of the Code on the use of a postal service in an offensive manner serves the quite different purpose identified above. The offence need not involve the communication of offensive or defamatory matter to any third party.

(b) To the extent that there is any analogy, it may be found in the reasonableness requirement of the extended qualified privilege defence formulated in *Lange*. The publication of defamatory matter to a wide audience on a subject of government or political discussion will be protected by the extended defence if the publisher's conduct was reasonable in all the circumstances. The reasonableness standard in s 471.12 serves a similar function because the use of a postal service may be less likely to be offensive in the relevant sense, based on the reasonable persons test, where that use was in the course of discussion of political or governmental matters.

34. The appellant Monis submits that the extent of the burden imposed by s 471.12 is exacerbated by "the vagueness of the word 'offensive'",[68] referring to United States authority to the effect that regulations expressed in vague terms may have a "chilling effect" on free speech. But construed in the manner adopted by the Court of Criminal Appeal, the word "offensive" in s 471.12 cannot fairly be described as vague. In any event, even assuming the existence of a "chilling effect" caused by s 471.12, it may deter only communications that are arguably such as to arouse significant anger, significant resentment, outrage, disgust or hatred in the mind of a reasonable person, and made by persons intending or reckless as to whether or not they be so. The impact of such communications on the free flow of communications on government and political matters necessary for electors to exercise an informed choice under the Constitution is marginal at best.

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67 *Lange* at 568.

68 Monis submissions at par 48.

35. Further, the concept of a "chilling effect" cuts both ways: as McHugh J recognised in *Coleman v Power*[69] in relation to the use of insulting words, communications of an offensive nature may themselves have a chilling effect on political debate. The recipient of such communications may be unwilling to respond, whether to the sender through the mail or by more public means, for fear of encouraging further offensive communications to be sent to them through the postal system. Their contribution to the political debate may be lost.

36. A law may restrict political communication in one respect (for example, by establishing a permit system regulating the use of public spaces) in order to enable a multitude of voices to be heard by ensuring that that the loudest do not dominate.[70] Similarly, one of the effects of s 471.12 could be said to be the enhancement of the postal service so as to facilitate the free exchange of ideas and information necessary for electors to make informed choices under the constitutional system of government.

37. For these reasons, s 471.12 of the Code is reasonably appropriate and adapted to serve the identified legitimate end in a manner that is compatible with the maintenance of the constitutionally prescribed system of government.

**Reading down**

38. In the alternative, if s 471.12 is invalid in any aspect of its operation, it may be read down pursuant to s 15A of the *Acts Interpretation Act 1901* (Cth) so as to exclude from the scope of the word "offensive" those uses of a postal or similar service connected with communication on government and political matters. In accordance with the principles stated in *Victoria v The Commonwealth (Industrial Relations Act Case)*[71] and earlier cases, s 15A may be applied to read down general words or expressions so long as it is possible to identify from the terms of the law or its subject matter a reason for limiting its application and the operation of the remaining parts remains unchanged. In the *Industrial Relations Act Case*, an example was

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69 (2004) 220 CLR 1 at 54 [105]: "fear of insult may have a chilling effect on political debate".

70 See, e.g., *Corporation of the City of Adelaide v Corneloup* (2011) 110 SASR 334 at 367 [128] where Kourakis J referred to the use of a permit system to avoid "what might be described as the 'Olympic system' where the fastest, loudest, or most numerous prevail".

71 (1996) 187 CLR 416 at 502-503 (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ).

given of law made in exercise of the power to make laws with respect to trade and commerce being susceptible to reading down so as to limit its application to inter-State and overseas trade and commerce.[72]

39. Similarly, s 471.12 has been made with the intention of exercising the Commonwealth's power to regulate the use of a means of communication which, among its other uses, is essential to the freedom of political communication protected by the Constitution. The general word "offensive" may therefore be read down so far as necessary to ensure that the law does not encroach on that freedom. This is consistent with the approach adopted by McHugh J in *Coleman v Power*.[73] It would not alter the operation of the prohibition on "offensive" uses of a postal service in so far as such uses do not involve political communication.

## PART V: ESTIMATE OF TIME FOR ORAL ARGUMENT

40. Victoria estimates that it will require approximately 30 minutes for the presentation of oral submissions in these appeals.

**Dated**: 11 September 2012

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72 (1996) 187 CLR 416 at 502-503 (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ), referring to *Pidoto v Victoria* (1943) 68 CLR 87 at 109 (Latham CJ).

73 (2004) 220 CLR 1 at 54-56 [107]-[110].